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13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
14 **COUNTY OF SANTA CLARA**

15 Apple Computer, Inc.,
16
17 Plaintiff,
18
19 v.
20 Doe 1, an unknown individual, and Does
21 2-25, inclusive,
22
23 Defendants.

Case No. 104-cv-032178

**EX PARTE APPLICATION FOR
AN ORDER GRANTING LEAVE TO
SERVE EXPEDITED DISCOVERY
ON NFOX.COM AND KARL KRAFT
AND MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT
OF SAME**

24 Pursuant to California Code of Civil Procedure Section 2025(b)(2) and
25 California Rule of Court 379, Plaintiff Apple Computer, Inc. ("Apple") brings this *ex*
26 *parte* application for an order for expedited document discovery to Nfox.com.

27 Apple brings this application because the previous discovery authorized by the Court has
28 not revealed the true identities of the defendants in this action and because Nfox.com has
confirmed that it possesses documents likely to reveal those identities.

Apple's *ex parte* application is based on the Memorandum of Points and
Authorities set forth below, the Complaint, the previously-submitted Declaration of Robin
Zonic, the attached Declarations of David R. Eberhart and Ian N. Ramage, and any other

1 oral or documentary evidence that may be presented at or prior to the hearing on the
2 application.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 As set forth in Apple's previously-submitted *ex parte* application for discovery
5 and supplement thereto, good cause exists for immediate discovery to identify the proper
6 defendant or defendants in this action. Defendants, acting alone or in concert, have
7 misappropriated Apple's trade secrets regarding future product information and have
8 disclosed these trade secrets via three websites: Powerpage.org, Appleinsider.com, and
9 Thinksecret.com. (Declaration of R. Zonic ("Zonic Decl.") ¶¶ 12-17.) To date, Apple's
10 investigations have failed to uncover the identity of any of the Doe Defendants. (*Id.* ¶ 18;
11 Declaration of David R. Eberhart ("Eberhart Decl.") ¶ 3.)

12 In response to Apple's previous *ex parte* application, the Court found good
13 cause to issue an order granting Apple's request to seek documents from Powerpage.com,
14 Appleinsider.com, and Thinksecret.com. (Order Granting *Ex Parte* Application for
15 Discovery and Issuance of Commissions executed December 14, 2004.) The discovery to
16 those sites has not yet produced information sufficient to identify the Doe defendants.
17 (Eberhart Decl. ¶ 3.)

18 As a result of viewing news articles about this lawsuit, Mr. Karl Kraft contacted
19 Apple's counsel. Mr. Kraft informed Apple's counsel that his company, Nfox.com, hosts
20 the e-mail servers for Powerpage.org. (Eberhart Decl. ¶ 6.) Mr. Kraft stated that he had
21 voluntarily searched those e-mail servers and found a number of e-mail messages
22 containing Apple's internal code-name for the unreleased product at issue in this
23 litigation, "Asteroid." Mr. Kraft said that he would forward the e-mails to Apple's
24 counsel. (*Id.*) To date, Apple's counsel has not received any e-mails from Mr. Kraft.
25 (*Id.*) Apple therefore requests leave to serve a subpoena on Mr. Kraft and Nfox.com for
26 the production of those materials and any other documents revealing the identities of the
27 defendants in this case.

1 As reflected in the Court’s previous order granting Apple’s *ex parte* application
2 for discovery, Apple demonstrated that the misappropriation of its trade secrets and the
3 unknown identities of the defendants constituted good cause for document discovery on
4 an expedited basis. With this application, Apple seeks a narrower class of documents
5 from an additional entity that has confirmed it possesses documents likely to identify the
6 defendant or defendants. Defendant(s)’ conduct has caused Apple severe and irreparable
7 harm that will likely increase unless they are promptly identified, served with the
8 complaint, and enjoined from continuing to misappropriate Apple’s trade secrets.

9 **Ex Parte Relief Is Proper**

10 Apple’s *ex parte* request for expedited discovery is proper because this matter is
11 urgent—the product which has been the subject of the postings by defendant(s) is still
12 unreleased. (Zonic Decl. ¶ 12.) The persons who previously leaked trade secret
13 information about this product likely have access to additional trade secret information
14 about this product, and perhaps other products. Absent an injunction, the defendant or
15 defendants will likely continue their behavior, which will cause further harm to Apple.
16 (Zonic Decl. ¶¶ 5-7.)

17 Pursuant to Rules of Court 379(a)(1) and 379(b), Apple provided notice within
18 the required time period to Kurt Opsahl, counsel for Jason O’Grady, Monish Bhatia,
19 Kasper Jade, Appleinsider.com, and Powerpage.org. (Declaration of Ian N. Ramage
20 (“Ramage Decl.”) ¶ 2.) Mr. Opsahl does not represent Nfox.com, but he is the only
21 attorney known to Apple to be representing any related party. Mr. Opsahl has stated that
22 he will appear and oppose Apple’s *ex parte* application.

23 Apple also provided notice to Karl Kraft, owner and operator of Nfox.com.
24 (Ramage Decl. ¶¶ 3-5.) After reviewing the notice letter, Mr. Kraft informed Apple’s
25 counsel that he would not oppose this *ex parte* application.

26 With respect to the Doe defendants, pursuant to Rule of Court 379(a)(3), Apple
27 “should not be required to inform the opposing party or the opposing party’s attorney”
28

1 because Apple does not know the identity of the Doe Defendants or their attorneys, if any.
2 (Eberhart Decl. ¶ 3.) Through its investigation, Apple has been unable to identify any of
3 the Doe defendants. (Zonic Decl. ¶ 18.) If the requested discovery is successful in
4 identifying these defendants, Apple will serve the summons and complaint on those
5 individuals thereafter.

6 **The Requested Discovery is Narrowly Tailored**

7 As set forth above and in Apple's previously-filed *ex parte* application,
8 information regarding Apple trade secrets has been posted on the Powerpage.org website.
9 Information regarding the Apple trade secrets at issue first appeared on Powerpage.org on
10 November 19, 22, 23, and 26, 2004. (Zonic Decl. ¶¶ 12-14.) As a result of information
11 voluntarily provided by Mr. Kraft, Apple has now determined that Nfox.com possesses
12 documents that reference the internal code-name of the unreleased product at issue and, as
13 such, are likely to reveal the identities of the individual or individuals who provided the
14 trade secret information to Powerpage.org. (Eberhart Decl. ¶ 6.)

15 Apple therefore seeks leave to subpoena these documents from Nfox.com.
16 These documents represent a narrower class of documents than the Court previously
17 permitted Apple to seek from Powerpage.org. The exact language of the current request is
18 as follows:

19 All documents relating to the identity of any person or entity
20 who supplied information regarding an unreleased Apple product
21 code-named "Asteroid" or "Q97" (the "Product"), including postings
22 that appeared on Powerpage.com (the "Website") on November 19,
23 November 22, November 23, and November 26, 2004. These
24 documents include:

23 (a) all documents identifying any individual or individuals who
24 provided information relating to the Product ("Disclosing Person(s)"),
25 including true name(s), address(es), internet protocol ("IP")
26 address(es), and e-mail address(es);

26 (b) all communications from or to any Disclosing Person(s)
27 relating to the Product;

28 (c) all documents received from or sent to any Disclosing

1 Person(s) relating to the Product; and

2 (d) all images, including photographs, sketches, schematics and
3 renderings of the Product received from or sent to any Disclosing
Person(s).

4 Apple is informed and believes that Nfox.com may be served through its owner, Karl
5 Kraft. (Eberhart Decl. ¶ 8.)

6 The California Code of Civil Procedure provides that a plaintiff may not
7 serve a deposition notice until 20 days after the service of a summons on, or appearance
8 by, any defendant. CCP § 2025(b)(2). The Court may, however, grant leave to serve a
9 deposition notice on a earlier date if good cause is shown. *Id.* Good cause exists here
10 because Apple cannot serve any defendant(s) until it ascertains their identities, and it
11 cannot do that unless it is permitted the discovery sought in this application.

12 **This Court Should Modify its Order Sealing Documents**

13 The Zonic Declaration was previously filed under seal pursuant to this Court's
14 December 14, 2004 Order Sealing Documents. The information in the Zonic Declaration
15 remains highly confidential and should remain under seal. To the extent that the Court
16 concludes Mr. Opsahl needs access to that declaration to oppose this motion, Apple
17 requests that the Court modify, pursuant to California Rule of Court 243.2(e)(3), the Order
18 Sealing Documents to authorize Mr. Opsahl to inspect the Zonic Declaration on an
19 "Attorney's Eyes Only" basis.


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Conclusion

For the reasons set forth above, Apple respectfully requests that the Court grant its *ex parte* application for discovery and give Apple leave to subpoena, directly or through commission, the specific documents set forth above.

Dated: February 4, 2005

GEORGE A. RILEY
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